

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

CITY OF SOUTHAVEN, MISSISSIPPI,
AND HAROLD MOORE, LORINE CADY,
HERBERT DICKSON, AVERY KING,
LENA THATCH, JERRY POWELL, AND
OATY HART, INDIVIDUALLY AND
OFFICIALLY AS MEMBERS OF THE
BOARD OF ALDERMEN, CITY OF
SOUTHAVEN, MISSISSIPPI, AND
SCOTTSDALE INSURANCE COMPANY,
Plaintiffs

V.

NO. 2:92CV132-B-O

NUTMEG INSURANCE COMPANY AND
TWIN CITY FIRE INSURANCE COMPANY,
Defendants

MEMORANDUM OPINION

This cause comes before the court upon the agreement of all parties to submit the issue of insurance policy coverage to the United States District Court for a decision without a jury. All relevant facts concerning liability have been stipulated. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

INTRODUCTION

The City of Southaven, Mississippi (hereinafter "Southaven") purchased insurance for the city, its agents, and officers, through three companies, specifically Scottsdale Insurance Company (hereinafter "Scottsdale"), Nutmeg Insurance Company (hereinafter "Nutmeg"), and Twin City Fire Insurance Company (hereinafter "Twin City"). Southaven, its Board of Aldermen, and other agents of the

city were sued when a Southaven police officer shot and killed a hostage during an attempted bank robbery. Scottsdale defended the city and its various agents and officers, eventually settling the claim for \$850,000. Nutmeg and Twin City denied coverage and refused to contribute to the settlement. Southaven, the Board of Aldermen, and Scottsdale have brought this action against Nutmeg and Twin City, seeking contribution to the settlement and defense costs, compensatory damages for various mental distress claims, and punitive damages for bad faith denial of coverage.

FACTS

On February 17, 1989, Southaven police accidentally killed Randolph Lusk, a bank employee, in an exchange of gunfire with Bruce Shoulders, a bank robber who took Lusk hostage during an attempted robbery of the bank for which Lusk was employed. The Lusk family subsequently sued the city, its Board of Aldermen, and other agents of the city for the wrongful death of Lusk.

Southaven had three insurance policies which they assert provided coverage for the Lusk litigation. The Twin City policy, with liability coverage in the amount of \$500,000, provided general liability coverage for the city, but excluded errors and omissions coverage as well as claims arising out of law enforcement activities. Errors and omissions coverage includes civil rights claims. The Nutmeg policy, with liability coverage in the amount of \$1,000,000, provided errors and omissions coverage, but excluded

claims arising out of law enforcement activities. The Scottsdale policy, with liability coverage in the amount of \$1,000,000, provided coverage for law enforcement activities.

Scottsdale provided defense counsel for the Lusk lawsuit and settled the claim for \$850,000. It is stipulated that Nutmeg and Twin City provided a defense, but the extent of the defense provided by Nutmeg and Twin City is questionable in light of the fact that the plaintiffs in this action are seeking to recover a portion of their \$220,000 in defense costs. Nutmeg and Twin city offered to contribute a nominal amount to the settlement, but the plaintiffs refused and subsequently filed this suit.

LAW

The plaintiffs allege that both the Nutmeg and Twin City policies are ambiguous, so as to mandate coverage in favor of Southaven. It is well settled that ambiguities in an insurance policy are to be construed against the drafter and in favor of the insured. Government Employees Ins. Co. v. Brown, 446 So. 2d 1002, 1006 (Miss. 1984). Equally well settled is that ambiguities should not be created where none exist. Brander v. Nabors, 443 F. Supp. 764, 769 (N.D. Miss. 1978), aff'd, 579 F.2d 888 (5th Cir. 1978). The fact that an insurance policy requires interpretation does not render the terms of the policy ambiguous. Employers Ins. of Wausau v. Trotter Towing Corp., 834 F.2d 1206, 1210 (5th Cir. 1988).

Both insurance policies are very clear in terms of their

exclusions. The Nutmeg policy, on its declarations page, specifically excludes bodily injury. The only coverage which is marked as included on the declarations page is the errors and omissions injury. In its general section on coverage exclusions, the Nutmeg policy states that:

This insurance does not apply to:

....

20. **Errors or omissions injury**

....

f. Arising out of law enforcement activities.

(Emphasis in original.) In addition, each policy contains separate pages attached to the end of the policy which delineate the policy exclusions. Attached to each policy is a page entitled: EXCLUSION--LAW ENFORCEMENT ACTIVITIES. The Nutmeg law enforcement exclusion reads in pertinent part as follows:

The policy of which this endorsement forms a part does not apply to **bodily injury, property damage, personal injury** or **errors or omissions injury** arising out of any act or omission of your police department or any other law enforcement agency of yours including their agents or employees....

(Emphasis in original.) The Twin City law enforcement exclusion reads in pertinent part as follows:

It is agreed that this policy does not apply to **bodily injury, property damage** or **personal injury** arising out of any law enforcement activity by any insured whether acting alone or jointly with any other insured or any other person or organization....

(Emphasis in original.) The Twin City policy also contained a page entitled: EXCLUSION--ERRORS OR OMISSIONS INJURY which reads in pertinent part as follows:

It is agreed that this insurance does not apply to **errors or omissions injury** arising out of the named insured's operations.

(Emphasis in original.)

There is nothing ambiguous about the terms of either the Nutmeg or Twin City policies. In the absence of an ambiguity, the policies must be construed as written. Lowery v. Guaranty Bank and Trust Co., 592 So. 2d 79, 82 (Miss. 1991); State Farm Mut. Auto. Ins. Co. v. Scitzs, 394 So. 2d 1371, 1374 (Miss. 1981).

A. Nutmeg Policy

The Nutmeg policy, which only covers errors and omissions injury, clearly excludes coverage not only for bodily injury but for any claims arising out of law enforcement activities. The plaintiffs assert that the wrongful death of Lusk arises not out of law enforcement activities, but rather out of the acts and omissions of the Board of Aldermen in setting policy and appropriating funds for the training and equipping of law enforcement personnel, which acts and omissions predate the death of Lusk. The plaintiffs contend that the alleged failure of the Board of Aldermen to take appropriate legislative measures in light of the foreseeability of guns, bank robberies, and hostage situations amounts to deliberate indifference on the part of

Southaven. City of Canton v. Harris, 489 U.S. 378, 103 L. Ed. 2d 412 (1989). This alleged deliberate indifference would make the city and Board of Aldermen liable for civil rights violations against Lusk, so as to trigger the coverage under the Nutmeg policy. The plaintiffs further assert that the damages suffered by Lusk are not confined to bodily injury, but also include civil rights injuries.

Despite the plaintiffs' assertions to the contrary, this is a pure case of a police officer negligently firing his weapon. The injury for which the Lusk family sought to recover was a bodily injury arising out of law enforcement activity. As such, the Lusk claims are clearly excluded under the terms of the Nutmeg policy.

In Murdock v. Dinsmoor, 892 F.2d 7 (1st Cir. 1989), the plaintiff brought suit against the town of Gilsum, New Hampshire, for the acts of its police force in allegedly kidnapping and beating him. The town had three insurance policies, and the policy at issue excluded law enforcement activities. The plaintiff alleged that the city was negligent in the hiring, training, and supervision of its policemen. The First Circuit Court of Appeals held that the police officers' actions arose out of law enforcement activities and therefore the exclusion was validly applied so as to preclude coverage. Id. at 8. Any negligence of the town in hiring, training, or supervising its officers was directly connected to law enforcement activity. Id. The court recognized

that the three policies purchased by the town were comprehensive without overlapping so as to avoid the expense of duplicate coverage.

Similarly, in Lincoln National Health and Casualty Insurance Co. v. Brown, 782 F. Supp. 110 (M.D. Ga. 1992), Lincoln National issued three insurance policies to Tift County, Georgia. One policy provided coverage for law enforcement liability, and the other two specifically excluded law enforcement activities. Two individuals had sued the county, in part for failure to properly train and supervise its police force in the use of firearms. The complaint against the county also alleged civil rights violations. The court held that the two policies containing the law enforcement exclusions did not provide coverage for the plaintiff's injuries. Id. at 113.

In their brief, the plaintiffs fail to direct the court to any cases construing a law enforcement exclusion. The plaintiffs assert that the aforementioned cases are distinguishable in that they involve the failure to train, hire, and supervise police personnel, whereas this case concerns the city's failure to establish policy and fund training. However, a careful reading of all of the allegations listed in the Lusk complaint against the City of Southaven and its Board of Aldermen reveals that each one, no matter how creatively worded, boils down to a failure to properly train or supervise its police officers.

Furthermore, not only does the law enforcement exclusion preclude coverage under the Nutmeg policy, but the bodily injury exclusion does so as well. The damages suffered by Lusk are purely bodily injury damages, regardless of any attempts to couch the damages in terms of civil rights injuries.

In Continental Casualty Co. v. McAllen Independent School District, 850 F.2d 1044 (5th Cir. 1988), a high school student suffered burns when he placed potassium wrapped in paper towels in his pocket. He sued the school claiming that the safety policies were so inadequate as to rise to the level of a Constitutional violation. The insurance policy in question specifically excluded claims for bodily injury. The Fifth Circuit Court of Appeals held that the child was seeking damages for bodily injury and upheld the policy exclusion. Id. at 1046. In so holding, the court stated that "[t]he focus is on the origin of the damages, not the legal theory of the claim." Id.

Likewise in Continental Casualty Co. v. Hall, 761 S.W.2d 54 (Tex. Ct. App. 1988), cert. denied 495 U.S. 932, 109 L. Ed. 2d 503 (1990), two children injured their hands in a game of tug-of-war at school. The children subsequently filed a lawsuit in which they alleged Constitutional claims against the school. The policy at issue excluded claims for bodily injury. The court, in finding that the exclusion did apply so as to preclude coverage for the injuries, emphasized that the origin of the damages should be the

focus, rather than the legal theory of the claim asserted. Id. at 56.

In Continental Casualty Co. v. City of Richmond, 763 F.2d 1076 (9th Cir. 1985), the city of Richmond, California, was sued for the wrongful death of a prisoner in police custody in the Richmond jail. In addition to claims for wrongful death, the suit alleged civil rights violations against the city for the failure to train, supervise, assign, and discipline its employees. The policy in question excluded claims arising from bodily injury, assault, battery, or death. The city argued that the inadequate training and supervision of employees predated the misconduct and therefore the civil rights claims were distinguishable from the wrongful death claims. The court recognized that this type of causation analysis had been rejected by other courts, and held that the civil rights claims clearly arose from bodily injury so as to be excluded. Id. at 1081.

The plaintiffs further argue that the insurer must defend an insured against all actions brought against him based upon the allegations in the suit, even though groundless, false or fraudulent. E.E.O.C. v. Southern Publishing Co., 894 F.2d 785, 789 (5th Cir. 1990); State Farm Mut. Auto. Ins. Co. v. Taylor, 233 So. 2d 805, 808 (Miss. 1970). Although the plaintiffs correctly recite the law, a review of the Lusk complaint shows that there are no allegations which impose upon Nutmeg a duty to defend. Whereas the

Lusk plaintiffs may have labeled a portion of their complaint "Deprivation of Civil Rights", the allegations therein clearly pertain to bodily injury that arose out of law enforcement activities. Placing a heading on a page does not render everything contained within to be civil rights violations. Furthermore, while the Nutmeg policy provides coverage for civil rights claims, it specifically excludes those claims which arise out of law enforcement activity (which these do) as well as those claims for bodily injury (which these are).

When reading the three policies that have been placed in evidence, the only reasonable conclusion that can be drawn is that the policies were intended to provide comprehensive but not overlapping coverage. The Twin City policy covers everything but law enforcement activities and errors and omissions liability. The Nutmeg policy covers errors and omissions, while specifically excluding law enforcement activities. The Scottsdale policy covers only law enforcement activities. Is this court to believe that the city of Southaven and its Board of Aldermen purchased overlapping coverage, thus incurring excessive expense for insurance premiums? Certainly the more logical conclusion is that the city intended to and did, in fact, purchase three insurance policies that together provided comprehensive protection without duplicate coverage.

B. Twin City Policy

Having determined that the Twin City policy is not ambiguous,

it is clear that it does not provide coverage for the allegations contained in the Lusk complaint. The potential liability to the Lusk plaintiffs arises out of law enforcement activity, which is specifically excluded under the terms of the Twin city policy. Even assuming, just for the moment, that the Lusk complaint also raises claims of civil rights violations, the Twin City policy clearly excludes those as well.

The plaintiffs further contend that Twin City defended without issuing a reservation of rights letter, thus waiving their rights to deny coverage under the policy. Such a hyper-technical interpretation of the law cannot be stretched so far as to warrant a finding of coverage under the Twin City policy. The Twin City policy is a general liability policy which clearly excludes any possible interpretation of the allegations involved in this action. The court is hesitant to allow such a narrow and technical reading of the law to override the application of justice.

CONCLUSION

For the foregoing reasons, the court finds that neither the Nutmeg nor the Twin City policies provided liability coverage for the allegations of the Lusk complaint, and that, therefore, judgment should be entered in favor of the defendants.

An order will issue accordingly.

THIS, the _____ day of May, 1995.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE